STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 8, 2001
v	No. 220091 Livingston Circuit Court
BENJAMIN HORTON, Defendant-Appellant.	LC No. 99-010824-FH

Before: Murphy, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering a building with intent to commit a larceny, MCL 750.110; MSA 28.305. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to twenty five to forty years in prison. Defendant appeals as of right. We affirm.

Defendant argues that admission of defendant's 1981 larceny from a person conviction for impeachment purposes was improper because the trial court (1) failed to articulate its analysis in weighing the probative value of the impeachment evidence against its prejudicial effect under MRE 609(b), (2) applied the wrong legal standard to determine whether the prior conviction was admissible, (3) improperly concluded that larceny from a person is not a similar offense to breaking and entering, and (4) erroneously concluded that the larceny conviction was not precluded by the ten-year period. We disagree. We review the trial court's decision to allow impeachment with prior convictions for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

MRE 609 states as follows:

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless evidence has been elicited from the witness or established by a public record during cross-examination, and
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> (1) the crime contained an element of dishonesty or false statement, or
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> (2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

(c) Evidence of a conviction under this subrule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

In *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988), our Supreme Court set forth the standard for determining whether evidence regarding prior convictions is admissible for impeachment purposes:

> In sum, the trial judge's first task, under the amended MRE 609, will be to determine whether the crime contains elements of dishonesty or false statement. If so, it would be admitted without further consideration. If not, then the judge must determine whether the crime contains an element of theft. If it is not a theft crime then it is to be excluded from evidence without further consideration. It if is a theft crime and it is punishable by more than on year's imprisonment, the trial judge would exercise its discretion in determining the admissibility of the evidence by examining the degree of probativeness and prejudice inherent in the admission of the prior conviction. For purposes of the probativeness side of the equation, only an objective analysis of the degree to which the crime is indicative of veracity and the vintage of the conviction would be considered, not either party's need for the evidence. For purposes of the prejudice factor, only the similarity to the charged offense and the importance of the defendant's testimony to the decisional process would be considered. The prejudice factor would, of course, escalate with the increased similarity and increased importance of the testimony to the decisional process. Finally, unless the probativeness outweighs the prejudice, the prior conviction would be inadmissible.

First, although the record shows that the trial court did not analyze each factor in the probative versus prejudicial analysis individually, the trial court properly considered the arguments of counsel and articulated its rationale for its findings and conclusions on the record.

Accordingly, we reject defendant's argument that the trial court did not articulate its MRE 609 analysis. *Allen, supra*.

Second, contrary to defendant's contention, the trial court did not apply the wrong legal standard in admitting evidence of defendant's prior larceny conviction. Defendant was convicted of larceny from a person which is a crime that contains an element of theft and is punishable by more than one year imprisonment. Thus, under MRE 609(a)(2)(B), the trial court was required to determine whether the evidence had significant probative value on the issue of credibility and whether the probative value of the evidence outweighed its prejudicial effect. To this end, the trial court was required to consider the degree to which the crime was indicative of veracity, the age of the conviction, and the similarity between the prior conviction and the offense with which defendant was charged in the instant case. A review of the record reveals that the trial court correctly applied this standard in admitting the evidence.

Third, although we agree with defendant's contention that the trial court erred in finding that the offense of larceny is dissimilar to the instant offense of breaking and entering with intent to commit a larceny therein,[1] in view of the other factors weighing in favor of admissibility, we do not find that this erroneous conclusion warrants reversal.

Finally, we are not persuaded by defendant's argument that the larceny conviction was inadmissible under MRE 609(c) because it was more than ten years old at the time of trial. Defendant was convicted of larceny from a person in 1981 and released from prison on parole in 1986 or 1987. Defendant subsequently violated parole and was incarcerated for the parole violation, which stemmed from the original larceny conviction, until his release in 1998. Defendant's trial in this case commenced on April 26, 1999.

In *People v Washington*, 130 Mich App 579, 581; 344 NW2d 8 (1983), the defendant was convicted in 1969 of larceny in a building. The defendant was released from prison on parole, but returned for violation of parole and was finally released from prison on February 19, 1974. The defendant's trial for second-degree murder concluded on July 1, 1982. The defendant filed a motion to preclude admission of his prior larceny conviction, arguing that the ten-year period should either commence with his release on parole, or the period while he was on parole should be added to the period following his final release, totaling more than ten years. *Id.* This Court disagreed and admitted the evidence, stating as follows:

> We are not constrained to hold that a trial judge must compute the ten-year period under MRE 609(b) by adding any unsuccessful periods of parole to the time after final release from prison . . . . [*Id.*]

Likewise, in the instant case, defendant was released from prison on parole, but returned to prison for violation of parole and was finally released from prison on his larceny conviction in 1998. Indeed, defendant testified at trial that he was released from prison for his larceny

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[1] In fact, the prosecution concedes that these two offenses are similar in nature.

conviction in 1998. Therefore, the trial court did not abuse its discretion in admitting defendant's conviction for purposes of impeachment under MRE 609.

Next, defendant argues that the trial court improperly admitted prior bad acts evidence under MRE 404(b). Specifically defendant asserts that the trial court erred in allowing the prosecutor to elicit testimony from witnesses about a prior uncharged breaking and entering at Proform, to allow the inference that defendant was involved in the prior burglary and must therefore have committed the instant offense.[2] We disagree. A trial court's evidentiary rulings are reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). Use of a defendant's prior bad acts as evidence of the defendant's character is inadmissible at trial, except as permitted by MRE 404(b). *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Defendant's argument lacks merit because he failed to identify the crime, wrong, or bad act inherent in the evidence introduced by the prosecution which would trigger a MRE 404(b) analysis. Defendant himself points out that "over repeated defense objection, the prosecutor presented evidence showing that in November concrete forms were stolen from Pro-Form Poured Walls and then not long afterward police officers stopped Mr. Horton approximately two miles from Pro-Form" and that "many of these [concrete] forms were later recovered at a scrap yard called Consumers Recycling in Detroit, and Consumers Recycling receipts were found in Mr. Horton's wallet when the police took him into custody for the second breaking and entering." However, none of these acts by defendant—driving within two miles of the business and carrying receipts from Consumer's Recycling—constitute bad acts. Although a fact finder may infer from the evidence that defendant was involved with the prior theft, evidence that a prior theft occurred at the same location, defendant was stopped in the area of the theft, and items missing from the first theft were discovered in defendant's vehicle at the time he was arrested for the instant offense, do not constitute prior bad acts. Thus, MRE 404(b) is simply inapplicable to this evidence and the dispositive inquiry is whether the challenged evidence is relevant in this case.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Starr, supra* at 497. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Crawford, supra* at 388. To be material, evidence need not relate to an element of the charged crime or an applicable defense. The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted govern relevance and materiality. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). Even if relevant, however, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909, modified on other grounds 450 Mich 1212; 539 NW2d 504 (1995).

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[2] Defendant was suspected of being involved in the prior theft, but was never charged in connection with that offense. Any information in the police report of the first theft that related to defendant was stricken from the preliminary sentencing information.

In this case, defendant entered a general denial of guilt, thereby placing all of the elements of the crime at issue. *Mills, supra* at 69-70. The challenged testimony concerning defendant's implicit involvement in a prior theft at the same location was relevant to refute the defenses asserted by defendant. For instance, testimony from prosecution witness John Cogo, the owner of the business where the theft occurred, that his business had previously been burglarized, was relevant to understand why Cogo immediately called Officer Medbury upon finding a light on and a door partially opened at his business. Further, evidence that property stolen during the first theft had been discovered at Consumer's Recycling and that defendant had receipts from Consumer's Recycling in his pockets at the time of his arrest was relevant to explain why the officers proceeded directly to Consumer's Recycling to search for the stolen property in the instant case. Additionally, the challenged testimony concerning defendant's prior traffic stop only a few miles from Proform, was properly introduced to rebut defendant's claim that he was unfamiliar with the roads and the area where Proform was located because the business was situated in an obscure place far off the road. Therefore, the challenged testimony was relevant under MRE 401.

Finally, we are not persuaded by defendant's argument that even if relevant, the challenged testimony was "highly damaging" or unfairly prejudicial under MRE 403. Initially, we note that "unfair prejudice" does not mean "damaging." *Mills, supra* at 75. Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id*. at 75-76. On the existing record, we do not find that the evidence demonstrating that defendant was familiar with the area in which the theft occurred and establishing that Proform had been burglarized in the past was given undue or preemptive weight by the jury or that it was inequitable to use such evidence. As defendant himself points out, these facts alone do not prove that defendant committed the instant offense. Accordingly, we find no error.

Defendant also claims that the admission of Detective Thomas Cremonte's testimony that defendant was "not a kid" and was "streetwise" was improper because it constituted evidence of bad character under MRE 404(a). We disagree.

MRE 404(a)(1) provides:

> (a) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> (1) evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

Although defendant frames this issue in terms of defendant's character, a close reading of the record reveals that the rebuttal testimony of Detective Cremonte was actually introduced by the prosecution for the purpose of rehabilitating Cremonte's truthfulness and credibility after it was attacked by defense counsel on cross-examination, not for the purpose of impugning defendant's character. Thus, this testimony did not fall within the scope of Rule 404(a) which

limits character evidence when introduced "for the purpose of proving action in conformity therewith on a particular occasion."

However, even if such testimony could be construed as bad character evidence, defendant clearly opened the door to such evidence in his cross-examination of Cremonte. The record shows that defense counsel aggressively questioned Cremonte during cross-examination regarding the deceptive and coercive tactics used on defendant to try to elicit information from him, thereby portraying Cremonte as a liar and as an individual with some sort of personal vendetta against defendant. Under these circumstances, it was entirely appropriate for the prosecutor to ask Cremonte on redirect examination, as rebuttal evidence, why it was necessary to use such strong tactics with defendant. Moreover, the trial court properly restricted the prosecutor's rebuttal evidence by excluding testimony from Cremonte explaining why defendant's background made such tactics necessary. Thus, defendant's assertion that "[d]uring the direct examination of Detective Thomas Cremonte, the prosecutor deliberately presented evidence of Benjamin Horton's allegedly bad character" is simply incorrect. As the trial court correctly noted, the issue of defendant's character was first raised during defense counsel's cross-examination of defendant and the prosecution's subsequent inquiry of the issue was made only after defendant opened the door. Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Otherwise inadmissible evidence may be admissible for rebuttal purposes after an opposing party has opened the door to such evidence. See *People v Verburg*, 170 Mich App 490; 430 NW2d 775 (1988). Accordingly, we find no abuse of discretion.

Lastly, defendant raises several challenges to his twenty-five to forty year sentence, neither of which we find warrant relief. First, defendant argues that because he was convicted of a crime that occurred on December 18, 1998, and was one of the last individuals sentenced before the 1999 sentencing guidelines enacted by the Legislature went into effect, he should have been sentenced under the new guidelines. This Court recently rejected an identical argument regarding retroactive application of the new guidelines in *People v Reynolds*, 240 Mich App 250; 611 NW2d 316 (2000). Further, the statute clearly provides that "[t]he sentencing guidelines promulgated by order of the Michigan Supreme Court shall not apply to felonies . . . committed *on or after January 1, 1999*" and "the minimum sentence imposed by a court of this state for a felony . . . committed *on or after January 1, 1999* shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed . . ." MCL 769.34(1) and (2); MSA 28.1097(3.4)(1) and (2); emphasis added. Accordingly, defendant's argument is without merit.[3]

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[3] We note that defendant's reliance on *People v Schultz*, 435 Mich 517; 460 NW2d 505 (1990) to support his position is misplaced. In *Schultz, supra* at 530-531, the Court expressly stated:

> . . . in the absence of a contrary statement of Legislative intent, criminal defendants are to be sentenced under an ameliorative amendatory act that is

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Defendant also argues that his twenty-five to forty year sentence as a fourth habitual offender is disproportionate to the offense and the offender. Specifically, defendant argues that the trial court erred in failing to consider the following factors: (1) his crime was not an exceptional one justifying such a long term of imprisonment, (2) his sentence will cost taxpayers $25,000 per year, (3) the offense was a property offense, and (4) the burglary of the warehouse occurred late at night with no innocent person present who could have been harmed.

After reviewing the record, we conclude that the trial court properly considered the seriousness of the circumstances of both the offender and the offense during sentencing. *People v Hansford (After Remand)*, 454 Mich 320, 325-326; 562 NW2d 460 (1997). The record reveals that defendant has an extensive criminal record which includes armed robbery, larceny, and burglary, and which spans over two decades. In addition, defendant's multiple felony convictions and prison sentences demonstrate that he is unable to conform his conduct to that required by the law. Further, defendant's contention that the instant offense was committed while "no innocent person [was] present who could have been harmed" is unpersuasive in view of defendant's prior record which includes three armed robbery convictions and indicates that he is willing to use weapons and to endanger victims if necessary in order to accomplish his purpose.

Further, defendant's sentence as a fourth habitual offender falls within the statutory limits. MCL 769.12; MSA 28.1084. A sentencing court does not abuse its discretion in sentencing an habitual offender within the statutory limits established by the Legislature when the offender's underlying felony, in the context of previous felonies, evinces the defendant's inability to conform his conduct to the laws of society. *Reynolds, supra* at 252; *Hansford, supra* at 326. The trial court was not only allowed to consider defendant's status as an habitual offender during sentencing, but was required to do so under MCL 769.12; MSA 28.1084. By contrast, there is no such requirement that the cost of defendant's sentence to the taxpayers be considered prior to sentencing.

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> enacted subsequent to the date of offense and becomes effective during the pendency of the prosecution.

The *Schultz* Court further provided:

> The Legislature also has the constitutional authority to provide that an ameliorative amendatory act applies prospectively to offenses committed after the amendatory act takes effect. [*Id*. at 525-526.]

In this case, the Legislature did provide a clear statement of legislative intent that the new guidelines were to be applied prospectively only to offenses committed after the act took effect, while the old guidelines continued to apply to offenses committed before January 1, 1999. By contrast, our Supreme Court found no such statement of intent in the sentencing legislation at issue in *Schultz*. Thus, *Schultz* and its progeny, relied upon by defendant. are not controlling.

Lastly, defendant argues that the trial court failed to adequately consider the four necessary factors of deterrence, protection of society, punishment, and rehabilitation, during sentencing. *People v Snow*, 386 Mich 586; 194 NW2d 314 (1972). However, our review of the record reveals that the trial court properly considered the *Snow* factors. After lengthy argument from both sides, the trial court found that defendant was a career criminal. The trial court then carefully considered the weight to be afforded defendant's prior convictions, as evidenced by its willingness to strike the reference in the presentence investigation report to defendant's suspected involvement in the previous, uncharged theft at Proform, and its decision not to order defendant to pay restitution for the previous uncharged crime. The trial court considered other factors such as defendant's bad luck and the good police work involved, defendant's extensive criminal history, his potential for rehabilitation, protection of society, deterrence, and punishment in sentencing defendant. Accordingly, we find no merit to defendant's argument. The trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ William B. Murphy
/s/ Kurtis T. Wilder